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No. 01-1607

In the Supreme Court of the United States

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

GREER GOLDMAN
JOHN T. STAHR
MARK R. HAAG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, empowers the United States to respond to releases or threatened releases of hazardous substances and to recover response costs from defined classes of liable parties. 42 U.S.C. 9604-9607. CERCLA also authorizes any person who incurs response costs to seek contribution, but provides that a person who has resolved its liability to the United States in a settlement shall not be liable for claims for contribution for matters addressed in the settlement. 42 U.S.C. 9613(f)(1)-(2).

The question presented in this case is whether the district court abused its discretion in approving a consent decree between the United States and certain settling parties that, in accordance with 42 U.S.C. 9613(f)(1) and (2), gives the settling parties protection from contribution claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 277 F.3d 1012. The opinion of the district court (Pet. App. 18a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2002. The petition for a writ of certiorari was filed on April 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' affirmance of the district court's approval of a consent decree (Pet. App. 53a-86a) resolving the United States' claims

against five defendants (the Customer Group) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The consent decree provides for the cleanup of a site in Des Moines, Iowa, that is contaminated with hazardous substances. Petitioner is the owner and operator of most of the site. The members of the Customer Group were customers of a pesticide-formulation business that petitioner's corporate predecessor operated at the site. Under the consent decree, the Customer Group will contribute $2.5 million towards the cleanup of the pesticide contamination at the site. Petitioner declined to participate in the negotiations that led to the consent decree, despite the government's repeated invitations. Pet. App. 3a-4a. At the time of the settlement, petitioner was pursuing a contribution action against the Customer Group. *Dico, Inc.* v. *Amoco Oil Co.*, No. Civ. 4-97-10130 (S.D. Iowa Mar. 13, 2002) (Pet. App. 39a-52a). Over petitioner's objections, the district court approved the consent decree, Pet. App. 18a-38a, and the court of appeals affirmed, *id.* at 1a-17a. Thereafter, the district court dismissed petitioner's contribution action, finding that the consent decree resulted in an absolute bar to petitioner's claim for contribution. *Id.* at 51a.[1]

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That statute, which Congress revised and

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[1] The Des Moines site has been the subject of extensive litigation. This Court recently denied a petition for a writ of certiorari, filed by petitioner, involving separate issues arising from the cleanup of that site. See *Dico, Inc.* v. *United States*, 122 S. Ct. 2291 (2002) (No. 01-1223).

expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see *Bestfoods*, 524 U.S. at 55-56 & n.1; see also *United States* v. *Mexico Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992); *United States* v. *Northeastern Pharm. & Chem. Co.* (*NEPACCO*), 810 F.2d 726, 733 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

CERCLA provides the Environmental Protection Agency (EPA) with two alternatives for cleaning up sites contaminated with hazardous substances. Under Section 104(a), EPA may undertake response actions itself, using the Hazardous Substance Superfund. See 42 U.S.C. 9604(a). Under Section 106(a), EPA may require the responsible parties to undertake the response actions through administrative or judicial orders. See 42 U.S.C. 9606(a). Whichever route is followed, the United States may recover any response costs it incurs through a cost-recovery action under Section 107(a), 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *Union Elec. Co.*, 132 F.3d 422, 428 (8th Cir. 1997). CERCLA accordingly "places the ultimate responsibility for cleanup on those responsible for problems caused by the disposal of chemical poisons." *United States* v. *Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (citation omitted). Respon-

sible parties are jointly and severally liable for federal and state response costs.[2]

As a consequence of the SARA amendments, CERCLA provides a statutory mechanism for a liable party to obtain contribution from others when more than one party is liable for a response action. Section 113(f)(1) authorizes actions for contribution, which are to be resolved under "Federal law," applying "such equitable factors as the [district] court determines are appropriate." 42 U.S.C. 9613(f)(1). The right of contribution is subject to Section 113(f)(2), which provides that a party that has "resolved its liability to the United States * * * in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). That provision of "contribution protection" is intended to encourage settlements, thereby "expedit[ing] effective remedial actions and minimiz[ing] litigation." 42 U.S.C. 9622(a). Although a non-settlor's total liability is reduced by the amount the United States is able to recover through settlement, non-settlors remain jointly and severally liable for any costs that the United States has been unable to recover. 42 U.S.C. 9613(f)(2), 9622(h)(4).

2. The Des Moines TCE Site consists of several properties, including the Dico production facility and the Des Moines Water Works. Pet. App. 40a. For more than 30 years petitioner or its corporate predecessors (collectively referred to here as petitioner) manufactured a variety of metal industrial items at the site using various solvents. *Id.* at 31a, 40a. See *United*

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[2] If a responsible party can show that the harm is divisible, it may be liable only for its respective share of the harm. *Acushnet Co.* v. *Mohasco Corp.*, 191 F.3d 69, 75 (1st Cir. 1999).

States v. *Dico, Inc.*, 136 F.3d 572, 575 (8th Cir. 1998). Petitioner also ran a wholesale chemical distribution business and a pesticide and herbicide formulation operation on the site. Pet. App. 40a.

When tests revealed that the public drinking water supply for the City of Des Moines was contaminated with hazardous substances, EPA placed the site on the CERCLA National Priority List and initiated a remedial investigation. Pet. App. 3a; see *Dico, Inc.* v. *Diamond*, 35 F.3d at 348, 349 (8th Cir. 1994); *United States* v. *Dico, Inc.*, 136 F.3d at 574-575. EPA divided the response activities at the site into four phases, termed "operable units." The instant litigation involves operable units (OU) 2 and 4. Pet. App. 3a. OU-2 contains property contaminated by solvents and other volatile organic compounds (VOCs), while OU-4 contains property additionally contaminated by pesticides and herbicides. *Id.* at 20a, 40a-41a.

Thereafter, EPA ordered petitioner to undertake various cleanup actions. Petitioner did so, at a cost of approximately $5.7 million. Pet. App. 4a; see Pet. 2. Simultaneously, EPA and the Customer Group negotiated an administrative consent order under which the Customer Group agreed to carry out additional cleanup work. After petitioner and the Customer Group completed the work, EPA determined that the only remaining response actions necessary for OU-2/4 were (1) long term operation and maintenance and (2) institutional controls to insure that the property is not used for residential purposes. Pet. App. 20a.

EPA then invited petitioner and the Customer Group to negotiate a settlement of their liability for the costs of the remaining response actions at OU-2/4. Pet. App 21a. The Customer Group accepted that invitation, but petitioner repeatedly declined to participate. During

the course of the negotiations, EPA and the Customer Group kept petitioner informed of the settlement talks and the specific terms under discussion. EPA and the Customer Group ultimately reached agreement. See *id.* at 4a-5a. The proposed consent decree was lodged in the district court and published in the Federal Register for public comment. *Ibid.*; see *id.* at 53a-86a (consent decree); 64 Fed. Reg. 69,784 (1999).

The consent decree requires the Customer Group to pay $2,513,808 plus interest in connection with the OU-2/4 cleanup. Pet. App. 62a. Of that amount, $1,296,906 is for reimbursement of EPA's past costs and estimated future costs of overseeing performance of the response action selected in the OU-2/4 record of decision (ROD). The remaining $1,216,902 is to be used to carry out future response actions in connection with OU-2/4. The Customer Group's share of those costs was arrived at using the eight "Gore factors" the agency typically uses to allocate costs in CERCLA cases. *Id.* at 30a & n.4, 63a.

The consent decree provides the Customer Group with "contribution protection" for matters addressed in the consent decree. Pet. App. 70a. As a result, the Customer Group is protected from contribution actions or claims for past and future response costs in connection with OU-2/4, in accordance with Section 113(f)(2), 42 U.S.C. 9613(f)(2). The members of the Customer Group also waive all contribution rights that they may have against any other person for matters addressed in the consent decree. See Pet. App. 70a-71a.

3. After the United States lodged the proposed consent decree, petitioner moved to intervene and to consolidate the case with its pending contribution action against the Customer Group (*Dico* v. *Amoco*, *supra*). The district court granted intervention and

deferred action on consolidation. Pet. App. 5a. It later approved the consent decree over petitioner's objections. *Id.* at 18a-38a. Among other things, the district court rejected petitioner's contention that the contribution bar contained in the consent decree is unfair. *Id.* at 35a-36a.

The court followed the reasoning of the court of appeals in *United States* v. *Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990), which recognized that the contribution bar in Section 113(f)(2) does not deprive petitioner of any constitutionally protected interest because the contribution right claimed by petitioner was created by Section 113(f)(1) and is expressly subject to the limitation of Section 113(f)(2). Pet. App. 26a-28a, 35a, 37a. The court accordingly rejected petitioner's argument that the statutory extinguishment of its contribution claim implicated the Just Compensation Clause. *Ibid.* The district court concluded that the negotiation process that resulted in the consent decree was procedurally fair and that the consent decree is substantively fair, reasonable, and consistent with CERCLA. *Id.* at 29a, 30a-37a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court rejected petitioner's various procedural and substantive objections to the entry of the consent decree. *Id.* at 6a-17a. The court specifically rejected petitioner's argument that the consent decree unfairly or unreasonably provided contribution protection to the Customer Group, noting that such protection is explicitly authorized by Section 113(f)(2), is consistent with the underlying goals and policies of CERCLA, and does not provide a basis for constitutional objections. *Id.* at 9a-10a, 16a.

ARGUMENT

The court of appeals correctly determined that the district court did not abuse its discretion in entering the consent decree between the United States and the Customer Group. Petitioner is simply wrong in its assertion that the consent decree's provisions governing future claims for contribution are unconstitutional. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals affirmed the district court's entry of a consent decree that embodies the provisions of Section 113(f) of CERCLA, which governs contribution claims among settling and non-settling parties. See 42 U.S.C. 9613(f); Pet. App. 70a-71a. Although petitioner makes general assertions that the court of appeals' decision "conflicts with decisions of this Court and of other courts of appeals," *e.g.* Pet. 8, petitioner fails to identify any such conflict. To the contrary, the court of appeals' decision is entirely consistent with this Court's decision in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which recognizes that Congress has broad latitude to define and limit contribution rights among jointly liable parties. *Id.* at 646-647. The court of appeals' decision is also consistent with the First Circuit's decision in *Cannons Engineering*, which correctly recognizes that, because Congress created the right to contribution under CERCLA, in doing so Congress could place limits on that right without implicating the Fifth Amendment. 899 F.2d at 92 n.6. See Pet. App. 9a-10a, 26a-28a.

Petitioner also asserts (Pet. 15) a conflict with dicta in an unpublished district court decision. See *United States* v. *Maryland Sand, Gravel & Stone Co.*, No. Civ.

A. HAR 89-2869, 1994 WL 541069 (D. Md. Aug. 12, 1994). But nothing in the court of appeals' decision conflicts with *Maryland Sand*. In that case, the court concluded that non-settling parties could not have a constitutionally protected property interest in a contribution right because their right to contribution had not yet accrued. *Id.* at *10. Petitioner interprets that ruling to suggest that the non-settlors *would* have had a constitutionally-protected interest if their contribution claim *had* accrued. But the *Maryland Sand* court stated explicitly that, "[e]ven were the Court to find that [the non-settlors] enjoyed a constitutionally protected right to contribution at the time the EPA settled with other PRPs [potentially responsible parties], they were not statutorily entitled to seek contribution from every PRP." *Id.* at *10 n.29. In other words, they could only seek contribution from other *non*-settling parties, and not from the settling parties. See Pet. App. 27a-28a. In any event, even if the court of appeals' decision were in conflict with *Maryland Sand*, a conflict with dicta in an unpublished district court decision does not provide a basis for review by this Court.

2. Petitioner's argument that the court of appeals' decision "conflicts with federal common law" (Pet. 8-9) is based on its misguided view that the contribution rights at issue in this case have a source other than Congress. See, *e.g.*, Pet. 9 n.5, 13. Petitioner's premise is wrong. Before the enactment of SARA, CERCLA did not include an express contribution provision. As petitioner points out (Pet. 9), some courts nevertheless concluded that CERCLA implicitly created a right of contribution. But there is little basis for concluding that federal common law, apart from CERCLA, provided such a right. See *Texas Indus., Inc.*, 451 U.S. at

640-646. Indeed, most courts that inferred such a right thought that the source of that right was CERCLA. See, *e.g.*, *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) ("most courts ultimately ruled that [42 U.S.C.] Section 9607 [CERCLA section 107] conferred an implied right of action for contribution"), cert. denied, 513 U.S. 1183 (1995).

More importantly, to the extent that such pre-SARA contribution rights existed, they are irrelevant to this case. Petitioner's contribution claim was filed 11 years *after* Congress enacted SARA, which added to CERCLA the express contribution provision contained in Section 113(f)(1) and the express limitation on contribution actions contained in Section 113(f)(2). Those express provisions displace any prior implied or federal common law right of contribution. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317-319 (1981) (concluding that the Clean Water Act superseded federal common law of nuisance); *Arizona* v. *California*, 373 U.S. 546, 565-566 (1963) (concluding that federal legislation superseded the federal common law doctrine of equitable apportionment).

Petitioner does not dispute that its contribution claim was brought under Section 113(f)(1). See Pet. 2. And petitioner cannot dispute that Congress has the power to impose limitations on the contribution rights it creates. Thus, petitioner's contribution rights are subject to the limitations set out in Section 113(f)(2). Accordingly, petitioner is mistaken in its contention that the court of appeals' decision conflicts with "federal common law" and "congressional intent to codify a vested and constitutionally protected contribution right" (Pet. 9).

3. Petitioner is also mistaken in asserting (Pet. 13-14) that CERCLA's severability provision, Section 308, demonstrates Congress's intent to codify a contribution right capable of rising to the level of a vested, constitutionally-protected property right. Section 308 states:

> *If* any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. *If* an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and *if* the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment * * * such limitation on the right to obtain contribution shall be treated as having no force and effect.

42 U.S.C. 9657 (emphasis added). Section 308 merely refers to the hypothetical possibility of a taking of vested rights in the context of administrative settlements, just as it refers to the possibility that provisions of the statute may be "held invalid." Congress simply recognized that vested rights *might* be implicated in a particular administrative settlement. Nothing in Section 308 indicates that Congress affirmatively believed that such rights are in fact generally implicated, any more than Section 308 indicates that Congress believed parts of CERCLA are invalid.

4. The fact-bound character of the case makes further review unwarranted. The court of appeals evaluated the district court's decision under the appropriate standard of review, Pet. App. 13a, and it deter-

mined that the district court did not abuse its discretion in concluding that the consent decree was procedurally and substantively fair, reasonable, and consistent with CERCLA, *id.* at 13a-17a. The question before the court of appeals in this case was a limited one, and the court of appeals properly answered that question based on the specific facts in the record. *Id.* at 13a-16a.

There is accordingly no basis for petitioner's assertion (Pet. 8) that the court of appeals' decision "tells the government that it can always strip contribution rights from a party who has remediated a site; no matter the time, the circumstances, the amount of investment in the assertion of the claims, or even the reduction of the claims to judgment." The court of appeals' decision says no such thing. Rather, it says that, in this case, where the record demonstrates that the consent decree was negotiated in a procedurally fair manner and is substantively fair, reasonable, and consistent with CERCLA, it was not an abuse of discretion for the district court to approve and enter it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

GREER GOLDMAN
JOHN T. STAHR
MARK R. HAAG
Attorneys

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